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No. 86-483

In the Supreme Court of the United States

OCTOBER TERM, 1986

GREGORY PIERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner, who was held in contempt for refusing to testify before a grand jury, was deprived of an adequate opportunity to explain the reasons for his recalcitrance.

2. Whether under 28 U.S.C. 1826(b) petitioner is entitled to a credit on his underlying sentence, which was stayed by his contempt citation, for the period in excess of 30 days that the court of appeals took to decide his appeal, where the claim on appeal was ultimately found to be without merit.

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OPINIONS BELOW

The May 16, 1986, opinion of the court of appeals (Pet. App. A3-A8) is unreported. The July 8, 1986, opinion of the court of appeals (Pet. App. A9-A14) is reported at 794 F.2d 749.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 1986 (Pet. App. A1-A2), and a petition for rehearing was denied on August 6, 1986 (Pet. App. A15-A16). The petition for a writ of certiorari was filed on September 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a member of the "Black Hebrew" sect, was charged in October 1985 in the Eastern District of Virginia with seven counts relating to the purchase of airline tickets with a counterfeit credit card at Washington National Airport. His court-appointed attorney and the prosecutor negotiated a plea agreement under which petitioner pleaded guilty to a single count of fraudulent use of a counterfeit credit card, in violation of 18 U.S.C. (Supp. II) 1029 (a)(1).[1] As part of the plea, which was entered on December 5, 1985, the government agreed that it would "not call [petitioner] as a witness in any of the cases indicted in the District of Columbia involving other members of the alleged criminal organization operating within the 'Black Hebrew' sect" (Pet. App. A3, A17, A18).

Six days after the plea was entered, the prosecutor wrote to petitioner's attorney inviting petitioner to testify before a grand jury investigating criminal activity by the Black Hebrew sect. Petitioner declined that invitation, despite the prosecutor's offer of use immunity (18 U.S.C. 6002, 6003) and despite his warning that any lack of cooperation on petitioner's part would be made known to the judge at the sentencing on petitioner's plea (Pet. App. A20-A21, A39).

In February 1986, petitioner was summoned to testify before a grand jury investigating the Black Hebrews' alleged criminal activities. Petitioner, represented by another court-appointed attorney, invoked his Fifth Amendment privilege and refused to testify.

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[1] On January 10, 1986, petitioner was sentenced to one year's imprisonment for that offense.

He later was granted use immunity and was ordered to testify, but he still refused to do so, claiming that his plea agreement precluded the government from calling him before the grand jury. Pet App. A22-A23, A45. At a hearing on March 6, 1986, to show cause why petitioner should not be held in contempt, the district court heard evidence about the circumstances of the plea agreement from the attorney who had represented petitioner in connection with the plea (*id.* at A3, A5, A32-A41). The district court declined, however, to allow the attorney to testify about his subjective understanding of the plea agreement, indicating that the written text of the agreement was unambiguous and therefore controlling (*id.* at A5-A6, A36, A40, A43).[2]

After hearing the evidence and examining the written plea agreement, the district court determined that the agreement relieved petitioner from testifying only as to cases in which an indictment had already been returned as of the time of petitioner's guilty plea (Pet. App. A3, A43). Since the grand jury investigation in question plainly did not fall within that category, the court ruled that petitioner's plea agreement did not afford him a basis for refusing to testify before the grand jury. When petitioner persisted in his refusal to testify, the court held him in civil contempt and ordered that he be incarcerated for the life of the grand jury or until he agreed to testify. It further ordered that the sentence imposed in the Eastern District of Virginia be held in abeyance during his confinement for contempt. *Id.* at A42-A43, A45-A46.

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[2] The court also indicated (Pet. App. A43) that the prosecutor likewise would not be asked to give his subjective understanding of the agreement.

2. On March 12, 1986, petitioner filed a notice of appeal from the district court's order, and new counsel was appointed. On May 15, 1986, after full briefing, the court of appeals heard oral argument on the appeal. The following day, the court affirmed the order of the district court in an unpublished memorandum opinion (Pet. App. A3-A8). The court rejected petitioner's argument that the plea agreement was ambiguous, thereby warranting the admission of extrinsic evidence on the parties' intent (*id.* at A4). According to the court (*ibid.*), the agreement made clear that petitioner "was being excused from testimony in 'cases indicted' in a specific jurisdiction, not from grand jury investigations in that jurisdiction." The court further found (*id.* at A6) that the plain language of the agreement was consistent with the proceedings before the sentencing judge in the Eastern District of Virginia. At that time, the prosecutor mentioned petitioner's refusal to cooperate in the District of Columbia grand jury investigation. Neither petitioner nor his attorney stated that petitioner's failure to cooperate was justified by the terms of the agreement. The plain language was also bolstered, in the court's view, by the prosecutor's statement at the sentencing proceeding—with which petitioner agreed—that under the agreement, "the Government does not plan to call [petitioner] to testify in the cases *now indicted* in Washington, D.C." (*id.* at A5 (emphasis added)). Finally, although the district court had not allowed petitioner's prior attorney to testify about his understanding of the plea agreement, the court of appeals received and considered an affidavit from the attorney addressing that issue (*id.* at A6-A7 & n.6). The court concluded, however, that the affidavit actually supported the district

court's ruling, because the affidavit referred to the prosecutor's promise that petitioner would not be compelled to testify in connection with any Black Hebrew "prosecutions," and because prosecutions "do not begin until an indictment has issued" (*id.* at A7).

Since the court of appeals took more than 30 days from the filing of the notice of appeal to resolve the case, the court requested further briefing on whether petitioner should receive credit, pursuant to 28 U.S.C. 1826(b),[3] on his criminal sentence for the 35 days that the appeal consumed beyond the statutory 30-day period. After considering the supplemental briefs, the court held that petitioner was not entitled to credit on his criminal sentence for the period in excess of 30 days (Pet. App. A9-A14). According to the court (*id.* at A11 & n.2, A13), a civil contemnor's remedy is to seek release on bail under 28 U.S.C. 1826(b), which authorizes bail to a contemnor unless his appeal is either "frivolous or taken for delay." In so ruling, the court declined to follow *Melickian* v. *United States*, 547 F.2d 416 (8th Cir.), cert. denied, 430 U.S. 986 (1977), which held that a contemnor should be released on bail if a court of appeals does not meet the 30-day requirement of Section 1826(b), even if the contemnor is unable to show that his appeal is not frivolous or taken for delay (Pet. App. A13-A14).

On October 15, 1986, after the filing of the petition for a writ of certiorari, the district court ordered that

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[3] Section 1826(b) provides, in relevant part, that "[a]ny appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal."

petitioner discontinue serving any further incarceration relating to the civil contempt order (App., *infra*, 1a). Two days later, the government filed an application for order to show cause, requesting that petitioner be ordered to show cause why he should not be held in criminal contempt for refusing to testify before the grand jury. On November 5, 1986, the district court denied the government's application. In light of the district court's November 5 ruling, the government does not intend to pursue criminal contempt charges against petitioner.

ARGUMENT

1. Petitioner's principal contention (Pet. 9-15) is that he was denied his right to a full hearing on whether he had just cause for refusing to comply with the district court's order that he testify. Specifically, he claims that the district court erred by precluding him from presenting testimony concerning his (and his attorney's) subjective understanding of the plea agreement.

As an initial matter, we note that the circumstances of this case have changed somewhat since the petition for a writ of certiorari was filed. The district court has discharged petitioner from confinement for his civil contempt (App., *infra*, 1a), and the government does not intend to bring criminal contempt charges. Nonetheless, the case is not moot at this time. If petitioner were to prevail in showing that he had just cause for refusing to testify and that the contempt citation was wrongfully issued, he would be entitled to a credit on his criminal sentence for the period he served on the contempt citation, during

which time the underlying criminal sentence was held in abeyance.[4]

On the merits, we submit that the court of appeals' decision is correct. Petitioner's claim that the plea agreement justified his refusal to testify was fully considered by the district court. As the court of appeals noted (Pet. App. A5), the district court heard evidence concerning the background of the plea and studied the text of the agreement. The district court simply ruled that because the language of the written agreement was clear, extrinsic evidence of the parties' subjective understanding of the agreement would not be admitted. Except for its ruling on that issue—a ruling that we submit is correct[5]—the court in no way precluded petitioner from putting on evidence to support his claim that there was just cause for his refusal to testify.[6]

Furthermore, petitioner's claim that he was denied the opportunity to present evidence of his subjective understanding of the plea agreement is particularly

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[4] We have been advised that petitioner is now due to be released on his criminal sentence in May 1987. Petitioner's completion of that sentence would moot both issues in this case.

[5] As the court of appeals noted (Pet. App. A6), "[o]ne party's subjective understanding, whatever it might be, cannot override the unambiguous terms of an agreement, especially one not of Byzantine complexity but which to the contrary is written in plain English and covering only two and one-half pages." See generally 4 *Williston on Contracts* § 601, at 310 (3d ed. 1961).

[6] Notably, once petitioner's prior attorney completed his testimony, the lawyer who represented petitioner at the contempt hearing conferred with petitioner and then rested his evidentiary presentation without calling petitioner or any other witness to the stand (see Pet. App. A40).

unpersuasive in light of the court of appeals' consideration of an affidavit filed by petitioner's prior attorney on that very subject (see Pet. App. A7 & nn. 6-7). As the court of appeals pointed out (*id.* at A7), the affidavit, far from supporting petitioner's refusal to testify, was in fact "consistent with the plain language of the agreement itself." [7]

Petitioner's contention (Pet. 15 n.10) that the court of appeals' decision somehow conflicts with decisions of other circuits that have recognized a contemnor's right to a full hearing is without merit. The court's memorandum opinion in no way suggests that a contemnor can be denied a fair hearing. Similarly, the cases cited by petitioner (*ibid.*) do not hold that a district court, in conducting a hearing, must permit the defense to introduce evidence that is factually or legally irrelevant or otherwise inadmissible.[8]

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[7] Even aside from the unambiguous language of the agreement, the asserted propriety of petitioner's refusal to testify was belied by the events at his sentencing hearing. As the court of appeals noted (Pet. App. A6), the prosecutor at sentencing brought to the court's attention petitioner's refusal to cooperate in the District of Columbia grand jury proceedings, yet "[n]ot one word was interposed by [petitioner] or his trial counsel that the former's failure to cooperate was justified by the terms of the plea agreement." Furthermore, when the prosecutor explained to the sentencing court the terms of the agreement—that " 'the Government does not plan to call [petitioner] to testify *in the cases now indicted* in Washington, D.C.' " (*id.* at A5 (emphasis added))—petitioner indicated his agreement with the prosecutor's representation (*ibid.*).

[8] Indeed, in *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983), one of the principal authorities relied upon by petitioner, the Second Circuit made clear (*id.* at 1273) that if a district court determines, based on an offer of proof, that a witness's testimony would not be relevant, it can preclude the witness from testifying.

At most, the issue is whether the district court, in construing the plea agreement and excluding extrinsic evidence, properly applied common law principles of contract law, a question plainly inappropriate for review by this Court.

2. Petitioner also contends (Pet. App. 16-20) that under 28 U.S.C. 1826(b) the court of appeals should have given him credit on his criminal sentence for the period in excess of 30 days that it took the court of appeals to decide his appeal from the civil contempt citation. The 30-day period, however, was designed to protect contemnors with meritorious claims, and both courts below properly determined that petitioner's claim was not meritorious. Accordingly, the court of appeals correctly ruled that petitioner was not entitled to a credit on his criminal sentence.

a. As petitioner notes (Pet. 16-19), there is a conflict among the circuits on the interpretation of 28 U.S.C. 1826(b). In the Second and Eighth Circuits, a confined contemnor is released on bail if the appeal cannot be decided within the 30-day period. See, *e.g.*, *In re Fula*, 672 F.2d 279, 282-283 (2d Cir. 1982); *In re Rosahn*, 671 F.2d 690, 693-694 (2d Cir. 1982); *In re Grand Jury Proceedings* (*Horak*), 625 F.2d 767, 768 (8th Cir.), cert. denied, 449 U.S. 840 (1980); *Melickian* v. *United States*, 547 F.2d at 417-420; see also *In re July 1979 Term Special Grand Jury*, 656 F.2d 64, 66 & n.3 (4th Cir. 1981). The Tenth Circuit has apparently resolved its appeals within 30 days but has stated in dictum that the 30-day period is jurisdictional and may not be extended. See *In re Grand Jury Proceedings* (*Vargas*), 727 F.2d 941, 942-943 n.1 (10th Cir.), cert. denied, 469 U.S. 819 (1984); *In re Berry*,

521 F.2d 179, 181 (10th Cir.), cert. denied, 423 U.S. 928 (1975). The Fifth Circuit has simply extended the 30-day period by order if the case cannot be decided in a timely fashion. See, *e.g.*, *In re Grand Jury Proceedings* (*Gravel*), 605 F.2d 750, 751-752 (5th Cir. 1979); *In re Grand Jury Proceedings* (*Smith*), 604 F.2d 318, 319 (5th Cir. 1979). The First and Third Circuits have extended the period, apparently without issuing orders. See, *e.g.*, *United States* v. *Doe*, 460 F.2d 328, 332 n.3 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973); *In re Grand Jury Investigation* (*Hartzell*), 542 F.2d. 166 (3d Cir. 1976), cert. denied, 429 U.S. 1047 (1977). The Seventh Circuit recently treated the 30-day period as commencing when the contemnor files his brief on appeal, not when the notice of appeal is filed. *In re Grand Jury Proceedings of August, 1984*, 757 F.2d 108, 110-112 n.1 (1984), cert. denied, No. 84-1405 (Apr. 15, 1985). And the District of Columbia Circuit in the present case, in an approach that is functionally equivalent to that taken in the First, Third, and Fifth Circuits, has rejected the contention that a contemnor must be released on bail if his appeal is not resolved within 30 days.

Notwithstanding these disparate approaches, we believe that the issue raised here is unimportant and that review by this Court is not necessary. The conflict identified by petitioner has existed since the mid-1970s (see *Gravel*, 605 F.2d at 752 n.1) and we have seen no indication that Congress's intent has been contravened or that any unfair hardship has resulted. The reason is clear: Congress's purpose in enacting 28 U.S.C. 1826(b) was to protect *meritorious* contemnors. See, *e.g.*, *In re Grand Jury Proceedings*, 776 F.2d 1099, 1102 (2d Cir. 1985); *In re*

Grand Jury Proceedings of August, 1984, 757 F.2d at 111 n.1; *United States* v. *Johnson*, 736 F.2d 358, 361-362 n.5 (6th Cir. 1984); *In re Rosahn*, 671 F.2d at 694 (reviewing legislative history); *Melickian*, 547 F.2d at 417, 419. Yet the conflict cited by petitioner has no effect whatsoever on *meritorious* contemnors, because in all but frivolous cases or cases taken for delay, the contemnor is entitled to bail under 28 U.S.C. 1826(b).[9] Furthermore, as the government conceded below, if a contemnor is incarcerated on other charges, and if he prevails on his appeal, he is entitled to credit on his criminal sentence for all the time he has served since the contempt order was entered. See Gov't C.A. Supp. Br. 9; see also *Johnson*, 736 F.2d at 362 n.5 ("[I]f it is determined that [the defendant] was erroneously held in contempt, the time he has served under the contempt judgment can be credited toward his bank robbery sentence"). Thus, assuming the contemnor avails himself of the statutory bail remedy, the only person whose case would be affected by the different circuit approaches is one whose appeal is frivolous or taken solely for delay.[10] And there is nothing unfair or unjust if

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[9] As the court of appeals in the present case noted (Pet. App. A11 n.2), even a contemnor imprisoned on unrelated criminal charges can seek bail on the contempt matter and thereby resume serving his criminal sentence.

[10] Petitioner does not view his appeal to have been frivolous or taken for delay, but he did not seek bail on the contempt matter so that he could continue serving his criminal sentence. While he asserts that the bail remedy in that context was not logical (Pet. 18), we agree with the court of appeals (Pet. App. A11 & n.2) that even if the approach is "atypical," there is no reason why a contemnor who is incarcerated on an unrelated conviction cannot seek bail and thereby have his criminal sentence continue to run. Moreover, petitioner could

such a person does not obtain an automatic release after 30 days if his frivolous or dilatory appeal has not been decided.[11]

b. On the merits, we submit that the court of appeals' decision is correct. As the court correctly noted (Pet. App. A10-A11), Congress provided no remedy for the violation of 28 U.S.C. 1826(b), even though it did so with respect to other statutory time limits on judicial proceedings, such as the Speedy Trial Act of 1974 (18 U.S.C. 3162). This factor strongly suggests that Congress intended to provide no remedy for violation of the 30-day rule. Furthermore, as the court observed (Pet. App. A11, A12-A13), Congress's concern in passing 28 U.S.C. 1826(b) was to protect meritorious contemnors, and "[t]he liberal standard for granting bail ensures that no contemnor will languish in custody pending appeal except one who cannot show that the appeal is not frivolous or

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have sought mandamus to require the court to decide the case in a timely manner (see Pet. App. A10-A11 n.1, A13-A14 n.3). In any event, it is now clear—and hence, no longer illogical—that a contemnor serving a sentence whose appeal is not frivolous or taken for delay has a means to avoid having his sentence stayed during the pendency of the appeal. Thus, the rule adopted in the District of Columbia Circuit works no hardship on any contemnor filing a nonfrivolous appeal.

[11] We note that the courts have endeavored to resolve appeals under 28 U.S.C. 1826 as promptly as possible. The Second Circuit, for example, has instructed the parties to provide special notice to the court if an appeal falls within 28 U.S.C. 1826(b) so that the court can set an expedited briefing schedule. See *In re Grand Jury Proceedings*, 776 F.2d at 1102 & n.1; *In re Rosahn*, 671 F.2d at 694 n.1. See also *Melickian*, 547 F.2d at 418 & nn. 1-5 (citing several cases in which appeals have been disposed of within 30 days).

taken for delay" (Pet. App. A11 (footnote omitted)). In short, the court of appeals correctly construed Section 1826(b) in refusing to credit petitioner's underlying sentence for the period in excess of 30 days that was needed to decide the appeal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1986

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. No. 86-66

IN RE: GRAND JURY PROCEEDINGS GREGORY PIERCE

[Filed Oct. 15, 1986]

ORDER

Upon consideration of the request for discharge from confinement filed on behalf of Gregory Pierce, the government's response thereto and the entire record herein, it is by the court this 15th day of October, 1986,

ORDERED that the defendant Gregory Pierce discontinue serving any further incarceration relating to the contempt order issued by this court on March 10, 1986.

/s/ J. H. Pratt
JOHN H. PRATT
United States District Judge

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